

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	CRIMINAL NO. 09-Cr-228
	)	
v.	)	
	)	
LLOYD MALLORY,	)	[Trial: J. Ellis: 3-18-2010]
	)	
Defendant	)	
	)	

MEMORANDUM OF LAW OF THE UNITED STATES RE: CONSPIRACY AS CHARGED  
UNDER TITLE 18 SECTION 1349

Comes now the United States, by its attorneys, Neil H. MacBride, United States Attorney, and Assistant United States Attorneys Edmund Power and Stephen Learned, and submits this memorandum of law regarding the law of conspiracy as charged in Count One of the indictment.

Citing Section 31.03 of O'Malley, Grenig & Lee, Federal Jury Practice & Instructions (6th Ed. 2008), the Government's Proposed Jury Instruction No. 5, previously filed on February 17, 2010, provides as follows:

THE ESSENTIAL ELEMENTS OF THE OFFENSE CHARGED

In order to sustain its burden of proof for the crime of conspiracy to commit wire and mail fraud as charged in Count One of the indictment, the government must prove the following three (3) essential elements beyond a reasonable doubt:

One: The conspiracy, agreement, or understanding

to commit wire and mail fraud, as described in the indictment, was formed, reached, or entered into by two or more persons;

Two: At some time during the existence or life of the conspiracy, agreement, or understanding, defendant Lloyd Mallory knew the purpose of the agreement; and

Three: With knowledge of the purpose of the conspiracy, agreement, or understanding, Defendant Lloyd Mallory then deliberately joined the conspiracy, agreement, or understanding.

In a footnote to its proposed instruction the Government pointed out that the fourth element of the standard O'Malley instruction, requiring an overt act, was omitted by the Government since the conspiracy charged in Count One was a charge under 18 U.S.C. §1349 and not §371.

Section 1349 provides as follows:

Any person who attempts or conspires to commit the offenses of wire or mail fraud shall be subject to the same penalties as those prescribed for the offense of wire or mail fraud, the commission of which was the object of the attempt or conspiracy.

Absent from the statute (unlike section 371) is the requirement of an overt act committed by a member of conspiracy in furtherance of the conspiracy.

Section 1349 was drafted to resemble other conspiracy statutes such as 21 U.S.C. §846 (drug conspiracy), 18 U.S.C. §1956(h) (money laundering conspiracy) and §951 (conspiracy to disrupt commerce). Proof of an overt act is not required for a prosecution under those statutes. See, Whitfield v. United States, 543 U.S. 209, 214-216 (2005)(money laundering conspiracy); United States v. Shabani, 513 U.S. 10, 13 (1994)(drug conspiracy); and United States v. Pistone, 177 F.3d 957, 960 (11<sup>th</sup> Cir. 1999)(Hobbs Act conspiracy).

The Government was able to find only one unpublished opinion directly on point with respect to section 1349. United States v. Warshak, 2008 WL 483339 at \*1 (S.D. Ohio 2008). Warshak squarely supports the Government's position.

Accordingly, the Government submits that its proposed jury instruction correctly states the law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of March 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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